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No. 86-1931

In the Supreme Court of the United States

OCTOBER TERM, 1987

ADELAIDE C. GRISWOLD, ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioners contend that their execution of disclaimers of their interests in a trust, which resulted in the transfer of those interests from petitioners to their children, was not untimely as the courts below held, and therefore did not constitute taxable gifts of those interests by petitioners to their children.[1]

1. a. Petitioners' grandfather, Alanson B. Houghton ("the settlor") died testate on September 16, 1941. His will established ten trusts, one of which was for the primary benefit of his daughter Elisabeth, who was petitioners' aunt. Under the terms of this trust, the income was payable to Elisabeth for life; upon her death, the income was payable to her issue or, if she had none, to eight

[1] The trust interests at issue here were conferred upon petitioners Adelaide C. Griswold, Amory Houghton, Jr., and James R. Houghton. Petitioners Ruth W. Houghton (Amory's wife) and May K. Houghton (James's wife) are parties to this case solely by virtue of having filed consents that any gifts by their husbands during 1974 be considered as having been made by both husband and wife. For convenience, we will refer to Adelaide Griswold, Amory Houghton, Jr., and James Houghton collectively as "petitioners."

named grandchildren of the settlor, including petitioners. The trust instrument further provided that the trust would terminate upon the death of the youngest of the settlor's issue (the "measuring life") who was alive both at the time of the settlor's death and at the time of Elisabeth's death. At that time the corpus would be distributed to Elisabeth's issue or, if she had none, to the settlor's above-mentioned eight grandchildren. Pet. App. A6-A8.

In March 1957, the trustees of Elisabeth's trust petitioned the New York Surrogate's Court for a judicial settlement of the trust's first intermediate accounting.[2] In the petition the trustees listed petitioners as each being a "contingent income beneficiary and contingent remainderman of * * * [Elisabeth's Trust]" (Pet. App. A8). In April 1957, the Surrogate issued citations to all persons having an interest in Elisabeth's trust, directing them to show cause at a certain time and place why the first intermediate accounting should not be allowed. The citations were directed to petitioners, among others, and "all persons interested in the trust for the benefit of Elisabeth Houghton under the Last Will and Testament of Alanson B. Houghton * * *" (*id.* at A9). Copies of the citation were personally served, by attorneys retained by the trustees, on petitioners (*id.* at A10). The Tax Court specifically found (*id.* at A21 n.17) that petitioners each had read the citation in 1957.

Elisabeth died without issue on March 2, 1974. She was survived by petitioners and the five other named grandchildren. Thus, under the terms of the trust, each grandchild, including petitioners, thereupon became entitled to receive one-eighth of the trust's income for life, and, if he

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[2] The two trustees were Amory Houghton and Arthur A. Houghton. Amory Houghton was the father of petitioners Amory, Jr., and James, and the uncle of petitioner Adelaide Griswold. Arthur Houghton was petitioners' cousin.

or she were to survive the "measuring life," one-eighth of the trust's corpus (see Pet. App. A10-A11). During the next three months, petitioners each executed a disclaimer, valid under state law, with respect to his or her income and remainder interests in Elisabeth's trust. As a result, petitioners' children received the interests that petitioners themselves would have received under the terms of Elisabeth's trust. On audit, the Commissioner determined that petitioners' disclaiming of their respective interests in Elisabeth's trust constituted taxable gifts of those interests to their children, and accordingly he determined gift tax deficiencies (*id.* at A11).[3]

b. Petitioners challenged the proposed deficiencies in the Tax Court, contending that their disclaimers did not in fact constitute taxable gifts. They relied on Section 25.2511-1(c) of the Treasury Regulations on Gift Tax, which provides in pertinent part that "a refusal to accept ownership [of property transferred from a decedent] does not constitute the making of a gift if the refusal is made within a reasonable time after knowledge of the existence of the transfer." They contended that they did not have "knowledge of the existence of the transfer" (*i.e.*, of the settlor's creation of their interests in Elisabeth's trust through his 1941 will) until Elisabeth's death in 1974 and therefore that the disclaimers they made shortly thereafter were not taxable. In support of this contention, petitioners argued that the applicable phrase in the regulations contemplated the taxpayer's " 'active knowledge not merely as to the existence of the trust but also as to the nature and value of the trust property and * * * [his] specific interest * * * therein' " (Pet. App. A17).[4]

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[3] The interests were each determined to have a value in excess of $1 million (Pet. App. A11 n.7).

[4] Petitioners' primary contention in the Tax Court originally was that the "transfer" of the interests to them did not occur when the trust was created in 1941, but rather occurred upon Elisabeth's death in 1974. After the trial in the Tax Court, this Court decided *Jewett* v. *Commis-*

The Tax Court sustained the deficiencies (Pet. App. A4-A21; 81 T.C. 141). It found that petitioners had acquired knowledge of the existence of their interests in Elisabeth's trust no later than 1957, when they were served with the Surrogate's Court citations. The court explained that these citations "clearly listed the names of each family member having an interest in Elisabeth's trust, including the names of Adelaide, Amory, Jr., and James," and "clearly stated that such persons were interested in 'a trust for the benefit of Elisabeth Houghton under * * * the Last Will and Testament of Alanson B. Houghton' " (Pet. App. A19). The court specifically found that "Adelaide, Amory, Jr., and James each read Elisabeth's citations during 1957" (Pet. App. A21 n.17). And the court rejected petitioners' contention that the disclaimer period under the regulation is not triggered unless the taxpayer knows, not only of the existence of his interest in a trust, but also its value (*id.* at A17-A20). Since petitioners had first acquired knowledge of the existence of their interests no later than 1957, the court found that their 1974 disclaimers were not made within a "reasonable time" thereafter under Treas. Reg. § 25.2511-1(c). Hence, they were taxable gifts.

The court of appeals affirmed in an unpublished opinion (Pet. App. A1-A3; 812 F.2d 172 (Table)). The court held that the Tax Court did not err in holding that "petitioners had not sustained their burden of proving that they had not read the [Surrogate's Court] citations in 1957" (*id.* at A2). The court also upheld the Tax Court's "implicit finding that the 1957 citations were sufficient to inform petitioners that they had interests in the trusts" (*ibid.*). The court of appeals accordingly concluded that, because there was "no clear error in the Tax Court's findings as to peti-

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sioner, 455 U.S. 305 (1982), which clearly established that the "transfer" here occurred in 1941. Petitioners then focused in a supplemental brief on the argument that they lacked "knowledge" of their interests before 1974. See Pet. App. A16-A17.

tioners' actual knowledge in 1957 that they had interests in the trusts, there is no basis for overturning its conclusion that the 1974 disclaimers were not made within a reasonable time" (Pet. App. A3).

2. Petitioners contend (Pet. 7-14) that the lower courts erred in finding that petitioners had knowledge in 1957 of their interests in Elisabeth's trust. This factual contention plainly does not merit review by this Court. It is axiomatic that, absent the most exceptional circumstances, this Court will not disturb a factual finding concurred in by both lower courts. See, *e.g.*, *Branti* v. *Finkel*, 445 U.S. 507, 512 n.6 (1980); *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635-636 (1967). There is no reason to deviate from that practice here. Moreover, the decision below is unpublished, and it is not alleged to conflict with a decision of any other court.[5]

Petitioners repeatedly state (Pet. 7, 8, 10, 13) that the decision below was incorrect in construing the term "knowledge" in the applicable regulation to encompass "constructive knowledge," when the term should be restricted to "actual knowledge." But this contention simply mischaracterizes the court of appeals' opinion. The court of appeals stated in the clearest language imaginable that it found "no clear error in the Tax Court's findings as to petitioners' *actual knowledge* in 1957 that they had interests in the trusts" (Pet. App. A3 (emphasis added)). In the same vein, petitioners assert (Pet. 8-9) that both courts below erected a "presumption" that "receipt of the citations [in 1957] constitute[d] actual knowledge of their contents." Petitioners again ignore the fact that the Tax Court (in a footnote to the passage that they quote) "found that

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[5] In addition, as petitioners acknowledge (Pet. 11), the question they seek to present is of diminishing future importance. Because of a statutory change made by the Tax Reform Act of 1976, Pub. L. No. 94-455, § 2009(b)(1) and (e)(2), 90 Stat. 1893, the regulation at issue here has no application to trust interests created after December 31, 1976.

[petitioners] each *read* Elisabeth's citation during 1957" (Pet. App. A21 n.17 (emphasis added)). The court of appeals upheld that factual finding (*id.* at A2-A3). Thus, it is clear that neither court relied upon a presumption such as petitioners describe. In sum, the legal issues that petitioners discuss simply are not presented in this case. Rather, this case turns on a factual finding concurred in by both lower courts—one that turned in part on the trial judge's assessment of the testimony given before him (see Pet. App. A21 n.17). The case presents no legal issue for this Court to review.[6]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

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[6] We note that we do not necessarily agree with petitioners' assertion that the Regulation must be interpreted to require "actual" knowledge, rather than "constructive" knowledge. Such an assertion is particularly questionable in a case like this, where responsibility for the supervision of petitioners' family trusts (including the trust at issue here) was delegated to a family-run corporation (see Pet. App. A8). But this issue simply is not presented here.

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